

Telecommunications
E Commerce
Technology
Corporate & Finance
Trademarks
Proprietary Rights
Complex Litigation
General Business Law

The Helein Law Group, P.C.

8180 Greensboro Drive
McLean, VA 22102

(703) 714-1300 (Telephone)
(703) 714-1330 (Facsimile)
mail@helein.com

Management Consulting Group
Global Telecompetition Consultants, Inc. (GTC)
(703) 714-1320 (Telephone)

Writer's Direct Dial Number
(703) 714-1301

Writer's Email Address
mail@helein.com

December 30, 1999

Via Courier

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
TW-A325
Washington, D.C. 20554

**Re: *Petition for Rulemaking, In The Matter of Implementation
of the Subscriber Carrier Selection Changes Provisions of
the Telecommunications Act of 1996***

Dear Ms. Roman Salas:

On behalf of Global Telecompetition Consultants ("GTC"), we hereby file an original and ten (10) copies of its Petition for Rulemaking to Establish Rules Regarding Carrier-to-Carrier Transfers of Subscriber Bases, *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, pursuant to 47 C.F.R. §1.401.

An additional copy of this filing is also enclosed, to be date-stamped and returned in the enclosed self-addressed envelope. Should you have any questions, kindly contact the undersigned.

Respectfully submitted,


Charles H. Helein

Enclosures

No. of Copies rec'd 0+10
List A B C D E CCB

RECEIVED

DEC 30 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

DOCKET FILE COPY ORIGINAL

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED

DEC 30 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Subscriber Carrier)
Selection Changes Provisions of the)
Telecommunications Act of 1996)
)
GTC Petition for Rulemaking)
to Establish Rules Regarding)
Carrier-to-Carrier Transfers)
of Subscriber Bases)

CC Docket No. _____

PETITION FOR RULEMAKING

Submitted by
Global Telecompetition Consultants, Inc. ("GTC")

Introduction

Global Telecompetition Consultants, Inc. ("GTC") is a telecommunications consulting firm managed by individuals with a variety of business, management, operational, networking and legal/regulatory expertise. GTC's collective experience includes competitive interexchange carriers, competitive local exchange service providers, telecom operations and pricing, local and long-haul network design and engineering, domestic and international services, financing, staffing/training, price/cost analysis, marketing programs, Internet/e-commerce, and the legal and regulatory issues which surround and affect all of these telecommunications areas.

GTC often consults and advises its common carrier clients on issues pertaining to the sale, purchase or transfer of their telephone subscriber bases. Since the Commission's adoption of the

*Second Report and Order*¹ on slamming ("Slamming Order") one year ago, GTC has noticed that numerous carriers have sought and were granted waivers of the Commission's slamming rules² prior to selling, purchasing or otherwise transferring their subscriber bases to other carriers.³ GTC has two concerns about what appears to be an informal, yet rigid and potentially costly, FCC rule which requires carriers to obtain Commission approval prior to the voluntary transfer of their subscriber bases to other carriers (hereafter referred to as the "waiver requirement").

The Commission failed to seek public comment and address the waiver requirement in its *Second Report and Order*. Its subsequent failure to notify potentially affected carriers about the requirement through a Public Notice or other announcement raises the concern that the lack of notice may result in, and perhaps already has resulted in well-intentioned carriers unwittingly transferring customer bases in contravention of the slamming rules. GTC believes that initiating a rulemaking

¹ *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Second Report and Order and Further Notice of Proposed Rule Making, 14 FCC Rcd 1508 (1998) ("Slamming Order").

² 47 C.F.R. §§ 64.1100-64.1190.

³ See In the Matter of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, CC Docket No. 94-129, Orders Granting Waivers: EqualNet Corporation Request for Waiver, DA 99-506 (March 15, 1999); One Call Communications, Inc. d/b/a Opticom Petition for Waiver, DA 99-1033 (May 28, 1999); Startec Global Operating and PCI Communications, Inc. Request for Waiver, DA 99-1461 (July 23, 1999); Citizens Telecommunications Company Alliance Group Services, Inc. Joint Request for Waiver, DA 99-1521 (July 30, 1999); Primus Telecommunications Group, Inc. Petition for Waiver, DA 99-1550 (August 5, 1999); New York Telephone Company, d/b/a Bell Atlantic - New York Request for Waiver, DA 99-1548 (August 6, 1999); MCI WorldCom, Inc. Request for Waiver, DA 99-1549 (August 6, 1999); AT&T Corporation Request for Waiver, DA 99-1718 (August 27, 1999); ALLTELL Communications, Inc. Request for Waiver and Expedited Treatment, DA 99-1820 (September 10, 1999); International Exchange Communications, Inc. Request for Waiver, DA 99-1819 (September 10, 1999).

and adopting its proposed rule will rectify these past notice infirmities. This will also serve the public interest by providing affected parties clear notice of the rules and regulations pertaining to transfers of subscriber bases and the possible penalties for failure to comply.

Next, having reviewed and analyzed the petitions and/or requests for waiver of the slamming rules granted by the Commission thus far, GTC believes that the waiver procedures are burdensome, time-consuming, and wasteful of Commission resources. In addition, the waiver requirement lessens the free alienability of communications properties.

To address these concerns, GTC believes the Commission should adopt a general rule (as suggested by GTC later in this Petition) rather than continuing to expend valuable public resources considering individual waiver requests. GTC believes that the time is ideal for the Commission to progress from its current waiver requirement policy to the adoption of rules governing carrier-to-carrier subscriber base transfers through formal rulemaking processes.

Discussion

Section 258 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, makes it unlawful for any telecommunications carrier to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such procedures as the Commission shall prescribe."⁴ The goal of section 258 is to eliminate the practice of "slamming," which is the unauthorized change of a subscriber's preferred carrier. Pursuant to section 258, carriers are absolutely barred from changing a customer's preferred local or long distance carrier without first complying with the Commission's verification

⁴ 47 U.S.C. § 258.

procedures.⁵ In the *Second Report and Order* on slamming, the Commission revised its procedures to ensure that carriers obtain the requisite authority prior to changing a customer's carrier. The Commission requires that carriers follow one of the Commission's prescribed verification procedures before submitting carrier changes on behalf of subscribers. Pursuant to these new procedures, carriers must: (1) obtain the subscriber's written authorization; (2) obtain confirmation from the subscriber via a toll-free number provided exclusively for the purpose of confirming orders electronically; or (3) utilize an independent third party to verify the subscriber's order. See 47 C.F.R. § 64.1150.

Prior to the adoption of the *Second Report and Order* on slamming on December 23, 1998, carrier-to-carrier sales, purchases and other transfers of telephone subscriber bases occurred frequently, for a variety of reasons, without regulatory intervention and, when properly done, without consumer complaints. For example, in the competitive long distance arena, comprised of hundreds of small, mid-size and large carriers serving over 150 million pre-subscribed lines⁶, companies have, in the past, been required to sell or transfer their subscriber bases to other carriers. Whether it was due to financial, legal, or other circumstances which prevented the selling carrier from continuing to serve its existing customers, these transfers often times required rapid consummation of the

⁵ The Commission's rules and orders clearly contemplate that a switchless reseller may be a customer's preferred carrier. Therefore, changes to a customer's preferred carrier that do not involve a change in the customer's underlying facilities-based carrier are nonetheless subject to the Commission's authorization and verification rules. See *Section 258 Order* at paras. 145-146; *WATS International Corp. v. Group Long Distance (USA), Inc.*, 12 FCC Rcd 1743, 1752 (1997) (citing *PIC Change Recon. Order*, 8 FCC Rcd at 3218).

⁶ *Long Distance Market Shares*, Fourth Quarter 1998, Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division Staff Report, March 1999, at Page 5.

transfer. Nevertheless, in such situations either the acquiring or selling carrier, and sometimes both, would provide notice to affected customers, via bill insert or otherwise, which explained that their long distance provider had changed or would change, that their existing rates and services would remain the same, and that they had the freedom to select another long distance carrier. This market-based approach was efficient, fair to all parties involved, and gave rise to very few customer complaints.

Since the adoption of the *Second Report and Order* on slamming, however, it appears as if the Commission abandoned this market-based approach in favor of an ad hoc approach which can be cumbersome, time-consuming, and inefficient; namely, that carriers formally petition the Commission for a waiver of its slamming rules⁷ prior to consummating a subscriber base transfer. There is no indication in the Second Report and Order, however, that carriers would or should be required to obtain prior Commission approval of preferred carrier changes which are the result of subscriber base transfers. To the contrary, the waiver requirement seems to have arisen as an internal staff policy determination. Regardless, an internal staff policy which is consistently applied becomes a de facto “rule.” However, no opportunity for advance notice and comment was ever afforded. This raises an important issue about the validity of the policy. In order to satisfy the Due Process requirements of the Administrative Procedures Act, GTC submits that the Commission must initiate a rulemaking and either formally adopt the waiver requirement as a rule or amend the existing slamming rules to permit a more cost-effective, efficient, and logical procedure which remains true to the spirit of the slamming rules and, at the same time, achieves the same outcome

⁷ 47 U.S.C. §§ 64.1100-64.1190.

that the Commission has achieved in its Orders granting requests for waiver of the slamming rules.

Proposal

Based on GTC management's long history in telecommunications and its current and on-going representation of its clients, GTC hereby petitions the FCC to initiate a rulemaking to amend the authorization and verification requirements of its rules and *Carrier Change Orders*⁸ to more appropriately apply to situations where the subscriber's carrier sells or transfers its subscriber base to another carrier as follows:

Subpart K - Changes in Preferred Telecommunications Service Providers

§ 64.1150 Verification of Orders for Telecommunications Service

No telecommunications carrier, **except as provided for in (e)**, shall submit a preferred carrier change order unless and until the order has first been confirmed in accordance with one of the following procedures:

...

(e) Any Preferred Carrier may acquire by stock or asset purchase, merger or other commercial transaction, another Preferred Carrier, or its customer base, in whole or in part, provided that notice by suitable means, direct mail, bill insert, Internet posting, publication in newspapers of general circulation, media advertising (broadcast and/or cable), or other notice is provided to customers of the Preferred Carrier (PC) being acquired that:

⁸ *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Further Notice of Proposed Rule Making and Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 10674 (1997), Second Report and Order and Further Notice of Proposed Rule Making, 14 FCC Rcd 1508 (1998) (*Section 258 Order*), *stayed in part*, *MCI WorldCom v. FCC*, No. 99-1125 (D.C. Cir. May 18, 1999); *Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Report and Order, 10 FCC Rcd 9560 (1995), *stayed in part*, 11 FCC Rcd 856 (1995); *Policies and Rules Concerning Changing Long Distance Carriers*, CC Docket No. 91-64, 7 FCC Rcd 1038 (1992), *reconsideration denied*, 8 FCC Rcd 3215 (1993) (*PIC Change Recon. Order*); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 F.C.C.2d 911 (*Allocation Order*), 101 F.C.C.2d 935 (*Waiver Order*), *reconsideration denied*, 102 F.C.C.2d 503 (1985) (*Reconsideration Order*) (the *Reconsideration Order* denied reconsideration of both the *Allocation Order* and the *Waiver Order*).

- (1) The acquiring PC is assuming control and management of their telecommunications service as of a designated date;
- (2) Their services will be billed at the same or equally competitive rates and pursuant to the same terms and conditions as tariffed by the transferring PC at the time of the transfer;
- (3) No PC change charges or other charges will be incurred as a result of the transaction; and
- (4) Each customer's right to select a PC remains unchanged.

The customer notice required herein must be given as soon as practicable but in no event more than 30 days after the Closing Date of the transaction. No state may adopt additional or different procedures than those provided herein.

Conclusion

For the reasons discussed above, GTC hereby formally petitions the Federal Communications Commission to initiate a rulemaking proceeding in order to amend its rules regarding changes in preferred telecommunications service providers or adopt new rules which permit carrier-to-carrier transfers of subscriber bases without a waiver.

Respectfully submitted,

**GLOBAL TELECOMPETITION
CONSULTANTS, INC. (GTC)**

By: 

Charles H. Helein
Its Counsel

Of Counsel:

THE HELEIN LAW GROUP, P.C.
8180 Greensboro Drive, Suite 700
McLean, Virginia 22102
Tel: 703.714.1300
Fax: 703.714.1330
e-mail: mail@helein.com

Dated: December 30, 1999